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NO. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

JOINT APPENDIX

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The opinion of the Arizona Supreme Court ordering a resentencing may be found in Appendix "C", pages A28-40 of the Petition for Certiorari. The supreme court opinion holding that the death penalty was barred upon resentencing may be found in Appendix "A", pages A1-26 of the Petition for Certiorari.

Initial Sentencing Hearing
July 3, 1980

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS WAYNE RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

Reporters Transcript of Proceedings
Pages 1 through 31

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES

FOR THE STATE:

JEFFREY A. HOTHAM
DEPUTY COUNTY ATTORNEY

FOR THE DEFENDANT:

ARTHUR G. HAZELTON, JR.
DEPUTY PUBLIC DEFENDER [R.T. 2][1]

THE COURT: CR-109082 (sic), State versus

Dennis W. Rumsey.

This is the time set for the presentencing hearing.

Court has read and reviewed the presentence report on several occasions.

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1. R.T. is the reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

Court has also received a letter dated June 28, 1980 from the Defendant's mother. It's available to counsel prior to the hearing. And I understand the State has no evidence.

MR. HOTHAM: That's correct.

Your Honor, the State would like to argue, but the State has no further evidence other than the evidence submitted at trial.

THE COURT: Counsel.

MR. HAZELTON: Art Hazelton appearing for and with Mr. Rumsey, Your Honor. We have one witness we would like to present for the defense in mitigation.

THE COURT: You may proceed.

MR. HAZELTON: Call to the stand Mr. Leslie Bart Hock. [R.T. 3]

Leslie Bart Hock,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAZELTON:

Q. Would you please state your name and occupation for the record?

A. Leslie Bart Hock, and I'm a project engineer with Sperry.

Q. Mr. Hock, were you selected to be a jury member in the trial that commenced on June 2nd, 1980 and proceeded through June 6th, 1980 here in this courtroom before Judge Coulter wherein Dennis Rumsey was tried on the charges of murder, first degree, and armed robbery?

A. Yes, sir, I was.

Q. And did you sit as a juror in the deliberations of the jury panel as a whole?

A. Yes, sir, I did.

Q. Were you selected foreman?

A. Yes.

Q. By the other members of the jury?

A. Yes, sir, I was.

Q. And during the deliberations of the jury, did you serve as a chair person for the conduct of the deliberations?

[R.T. 4]

A. Yes, sir.

Q. During the deliberations of the jury, were you provided copies of the instructions that were read to the jury by Judge Coulter?

A. Yes, sir.

Q. And were the instructions read by the jury and considered as to the two theories, the State's theories as to murder in the first degree by premeditation, and felony murder?

A. Yes, sir.

Q. Did the jury panel in their deliberations consider both of those instructions?

MR. HOTHAM: Objection -- strike that.

BY MR. HAZELTON:

Q. Did the jury consider both of those instructions?

A. Yes, sir.

Q. And I presume that the jury did enter a finding of murder, first degree is that correct?

A. We did, sir.

Q. Was that finding based on a unanimous vote as to murder, first degree, premeditation, based on that instruction, or on the felony murder instruction?

MR. HOTHAM: Objection, Your Honor. The State's position is that this question is improper impeachment of the jury's verdict.

We specifically spent a lot of time in chambers [R.T. 5] resolving the proper instructions to give to the jury about

this matter, and it was resolved that a special verdict in which the jury decided one way or the other whether it was premeditation or felony murder was not proper and it would be improper to have given that instruction, and since that was the Court's ruling and holding at the time, asking the foreman of the jury at this time what the theory of the jury was behind their conviction is improper impeachment of the jury's verdict.

THE COURT: Overruled.

BY MR. HAZELTON:

Q. Please answer.

A. Okay. I'm not sure of the question. We did reach a verdict of felony murder.

Q. And you rejected the theory of premeditation, is that correct?

A. Yes, sir, we did.

Q. Mr. Hock, if you were asked to make a recommendation to the judge regarding the sentence of Mr. Rumsey, knowing that the judge has the two options for first degree murder of life imprisonment or death, do you have an opinion or recommendation to the judge for sentencing?

A. Yes, sir.

Q. And what is that opinion?

MR. HOTHAM: Objection, Your Honor, I don't believe it's proper for this witness to testify as to what his opinion is, [R.T. 6] and it's the case law, and statutes in Arizona provide that the judge is to be the deciding person as far as what the penalty is to be given. I don't believe that it would be proper for him to make an opinion as to what would be appropriate in the matter.

It's certainly not something that opinion evidence is the right grounds for.

THE COURT: Overruled.

THE WITNESS: Yes, sir. My opinion, and most of the jury felt that it should be life.

MR. HAZELTON: Thank you very much, Mr. Hock.

I have no further questions.

CROSS-EXAMINATION

BY MR. HOTHAM:

Q. Thank you, Your Honor.

You say that most of the people on the jury felt it should be life. Does that mean there were people that felt death would be appropriate?

A. I couldn't say, sir. Those that expressed opinions, and that was not all of us.

Q. I see.

Let me read to you the statute in reference to the expectation of receiving something of pecuniary gain, which is a factor that the judge must determine whether there is an [R.T. 7] aggravating factor for death.

The statute says that death can be properly imposed if the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

Do you think that the State proved beyond a reasonable doubt that the defendant committed the offense in the expectation of the receipt of anything of pecuniary value?

MR. HAZELTON: Your Honor, I object. That calls for a legal interpretation of that clause.

THE COURT: Sustained.

MR. HOTHAM: I have no further questions.

THE COURT: Redirect?

MR. HAZELTON: I have none, Your Honor.

THE COURT: Thank you, sir, you are excused and free to go.

Thank you for coming.

MR. HAZELTON: The Defendant has no further evidence, to present, Your Honor.

MR. HOTHAM.: Your Honor, the State would like to argue the aggravating and mitigating factors in this case.

The State believes firmly that there are three aggravating factors in this case which have been proven beyond a reasonable doubt at the trial.

First of these is the risk of death to another, and [R.T. 8] it is the State's contention that the trial testimony indicates that Kimberly Holmes, while

sitting in the vehicle, was in the direct line of fire of the Defendant as he shot the victim from approximately five, six or seven feet away.

She testified that she was sitting in the car for at least three of the shots, and the evidence shows that the first two shots occurred while the car door was open, and therefore the shells, the bullets could have easily have hit her on a direct line of fire from the testimony from the defendant as he fired those shots.

The third shot occurred after she had shut the door, and there is a possibility that a ricochet from the Defendant's body, one foot away, could have hit her.

Her testimony was that the fourth shot was when the Defendant shot the victim in the back after he had dragged him over into the weeds.

The Defendant's testimony, through Detective Locksa, was that all four shots had occurred at the car, and that Kimberly had been inside the vehicle, and that he had been five, six or seven feet away from the victim as he shot.

I analyze or analogize this case with State v. Blazak. In Blazak, which is cited in my memorandum, Blazak involved a robbery attempt in a bar, and in that case the Defendant had fired four shots into the bartender after the bartender had refused to give him his money, and then had fired [R.T. 9] several other shots which struck the next person over and struck the next person over from that, and it is the State's contention in that case the court held that there was a grave risk of danger, and that was a proper aggravating circumstance to be

found, and it is the State's argument that that can be analogized to Kimberly Holmes sitting in the car as being exactly the same as the third patron who was sitting on the stool in the bar who was in grave risk of danger, which the court specifically found.

The second factor, aggravating circumstance which is proven by the trial testimony is the expectation of pecuniary gain.

This factor is not much reported because there's only one case in Arizona which even talks about it, but that is State v. Madsen, which is stated in my memorandum, and in that case the court held that the test of that aggravating circumstance was, "the receipt of the money must be the cause of the murder, not a result of the murder."

And it's clearly through in this case, I don't think there's any quibbling from the defense attorney about this at all, that the cause of the murder was the fact of the robbery of George Koslosky, which was due to the desire to receive money.

Now, I have cited to the Court in my memorandum a great many cases from a great many other jurisdictions, and in [R.T. 10] fact, the supreme jurisdiction in the land, the U.S. Supreme Court.

The U.S. Supreme Court in Gregg v. Georgia, and Proffitt v. Florida, which are cited in my memorandum, held that the death penalty could be properly imposed after it had been stricken in firm (sic), and the facts of Gregg v. Georgia are almost exactly the same as the facts in this case.

In Gregg v. Georgia, the Defendant and a friend were hitchhiking and were picked

up by the eventual victim, and there was testimony that the two people, the friend and the Defendant, had discussed robbing the victim, and that the Defendant at one point had shot the victim and then gotten the money and driven away in the automobile, which is almost exactly the factual situation that we have.

In Gregg v. Georgia in the lower court, the Supreme Court of Georgia had found the aggravating circumstance that the crime had been committed in the expectation of pecuniary gain, and the U.S. Supreme Court specifically held that that was a proper aggravating circumstance and that holding by the Georgia Supreme Court was proper.

Proffitt v. Florida, the companion landmark case, also was in a burglary situation, and they held there that a

burglary committed for pecuniary gain could also be considered under this aggravating factor.

I also cite to the Court various other [R.T. 11] jurisdictions, Arkansas, Florida, Mississippi, Nebraska, Utah, just to name a few, which have specifically held with statutes very similar to our statute that the commission of murder-robbery, that type of felony murder in a robbery situation, the aggravating factor of the expectation of pecuniary gain is viable and does find ground in those facts.

Our statutory scheme is very, very similar, Your Honor, to the scheme in Gregg v. Georgia and and (sic) in Proffitt v. Florida, and I noted in my memorandum that at least two of the Arizona cases which specifically hold

that our system, our statutory system is similar to that in the U.S. Supreme Court cases.

Now, Mr. Hazelton argues that subsection E-5 simply applies to murder for higher (sic) cases, and I would submit to the Court that that is not true.

I would quote from the brief in the Tyson (sic) case, which is presently the brief of the Attorney General's office in the Tyson (sic) case, which is presently in front of the Court.

It was the similar type of argument being made by the defense saying that it's too narrow to include a murder done in the course simply to rob, and the argument in the brief says that this interpretation fails to account for the additional language in the statute itself.

If the Court considers 5, which states that the Defendant committed the offense

as consideration for the [R.T. 12] receipt or in the expectation of the receipt of anything of pecuniary value, it is argued that if the Court were to remove the second subsection of that sentence, or in the expectation of the receipt, that by itself alone would handle the contract murder situation, regardless or not of whether the murderer is killed, because, as Mr. Hazelton would be arguing in contract law, consideration is the inducement to a contract, an act or forbearance for the promise thereof which is offered.

Consideration doesn't have to mean the payment, it's simply the consideration, the inducement or the act or forbearance.

Whether the hit man is actually paid when he kills because of agreement to be paid, he is covered by the portion of E-5

without the second subsection, which I'm arguing today, or in the expectation of the receipt, because the first part about the hit man would be covered as consideration.

So I think that the fact that the first part of that sentence refers to consideration, that clearly is talking about the murder for higher (sic) situation, but they, the Legislature specifically put in a second part of that sentence that says, "or in the expectation of the receipt," and it's the State's position, as covered by all these other jurisdictions, that that includes murders in the commission of robberies, and in that sort of situation.

The brief in the Tyson (sic) case goes on to say it is [R.T. 13] one of the cardinal rules of statutory construction

that statutes are to be given whenever possible such effect that no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant.

They cite State v. Deddens (phonetic).

Mr. Hazelton's position, which makes of the underlying clause mere surplusage would therefore be unacceptable.

Also cited in the Tyson (sic) brief is State v. Snow, 383 Atlantic Second, which states, "We are guided by the fundamental rule of statutory construction that words must be given their common meaning, unless the statute discloses a contrary intent."

Pecuniary plainly means of or relating to money, and benefit plainly means gain or an advantage.

Your Honor, I think the legislative intent is clear from the fact that there

are two different subsections, two different subclauses in that sentence to say that the first one applies to the murders for higher (sic) and the second one applies whenever there's an expectation of pecuniary gain, and this argument that I'm making today is, I think, bound and followed through by the way that the wording in Madsen is worded.

I think it's understood in the way that Madsen says that that whole paragraph applies in any kind of expectation of pecuniary gain. [R.T. 14]

If the court had desired at that time to say, no, pecuniary gain only applies in murder for higher (sic) situations, E-5 only applies in murder for higher (sic) situations, that would have been an excellent time to do that, but Madsen, they didn't do that, they simply said,

well, this insurance payment does not appear to be beyond a reasonable doubt the reason for the murder, but I believe they left open the door saying felony murders can be considered when it's for the expectation of pecuniary gain.

Now, the third point that the State feels that has been proven is the aggravating circumstance of heinous, cruel or depraved, and I will be the first to admit that the Supreme Court decisions are somewhat confusing as to what the important factors are, but in this case, I think the facts by themselves show that it was heinous and cruel, and the Court only needs to find, one, due to the recent case of Ceya, which stated that there's only one of those factors that really needs to be found in order for the whole aggravating circumstance to be found.

In this situation, the testimony revealed that the defendant awoke the victim from his sleep, pointed a gun at his head, made him get out of the car, and ordered the victim into the trunk of the car.

The victim refused, stating that he feared that he would suffocate in the trunk.

And then the defendant fired a shot over the [R.T. 15] victim's head, fired a second shot which hit the victim, causing the victim to yell, "Jesus Christ," and fall to the ground bleeding.

The Defendant fired a third shot into the victim's back, as the victim lay helplessly on the ground.

The victim then began to gurgle and gasp for breath, because his lungs had been punctured.

The Defendant then dragged the body over 250 feet into the desert behind some bushes.

He then fired a fourth shot, hitting the victim in the back again, stated, "sorry, dude," then took the money and the billfold from the body and left the victim to die, bleeding in the desert.

Those facts show both cruelty and heinousness.

Under the definition of cruelty under Ceya, they're talking more about the pain and suffering and anguish to the victim, and we know that the victim suffered because he was worried about suffocating in the trunk. He cried out, and he gurgled and gasped, and he laid there from those wounds in his back in the desert bleeding to death.

That certainly is pain and suffering which qualifies under the definition of cruelty.

We also have heinousness, the shooting of the victim twice in the back, because heinousness goes to the depravity or evil of the defendant's mind. [R.T. 16]

Shooting him repeatedly in the back, and the last time certainly while he lay helplessly on the ground, we don't know whether he was begging for mercy or what the situation was at that time, and driving away and leaving the body out in the desert, those certainly are acts showing a depraved mind which go to the heinousness of the situation.

And the cases that I've cited to the Court indicate that there is a trend in the law in the last two and a half years.

All of the cases, I believe, that have been decided this year, 1980, have been

finding cruel and heinous in similar type situations.

In Ceja, it was cruel and heinous to shoot a victim and drag a person into a bedroom and shoot them in the head four times, and then shoot another person in the back after that person had been mortally inflicted previously which is very similar to our situation.

The medical testimony was that the cause of death could have been either of the gunshot wounds to the chest, assuming that the first shot was a mortal wound. The second shot in the back can also be considered to be cruel and heinous.

In Steelman, court found it was cruel and heinous to bind and gag two people prior to shooting them, and also the fact in that case it was considered that the murders were unnecessary. [R.T. 17]

Surely in this case the murder was unnecessary.

In State v. Mata, the raping and beating of a victim and cutting her throat was found to be cruel and heinous. In State v. Knapp, the burning of two children by their father was found to be cruel and heinous. And in State v. Blazak -- all these citations are in my memorandum -- the shooting of the victim four times during robbery was found to be cruel or depraved.

And this case is almost exactly the same or has a lot of similarities to the Blazak case.

Blazak was the robbery of the bartender, and the purpose of that shooting was indeed also robbery, as in this case, and there was four shots into the body of the victim, which is the same

in both cases, and in that case, in Blazak, they found that was cruel or depraved.

They pointed out that there was no justification for defendant's actions in that even though the bartender would not comply with the robber's demands, he did not offer any actual resistance.

This is exactly the same as in our case, even though George Koslosky would not crawl in the trunk or give the Defendant the money, he did not offer any actual physical resistance, and therefore, there was no reason whatsoever for the Defendant to shoot the victim.

And the criteria in these previous cases shows that [R.T. 18] that is cruel and heinous.

The court is also instructed that it must, after it finds whether there are any aggravating factors, determine

whether there are any mitigating factors to balance against the aggravating factors.

Mr. Hazelton has filed a memorandum which cites to the Court several mitigating factors.

One of these is the youth of the Defendant.

The latest case, the latest Supreme Court case on youth, State versus Ceja, which is cited in my memorandum, tells you that there is something more to be considered than simply age.

Ceja, the defendant in Ceja was found that he had planned the crimes and prepared the crimes, and he was found to be mature, and deliberate about the crimes, and those factors made the Court find that there were no mitigating factors, that age did not qualify as a mitigating factor.

Another case, State v. Valencia, the Defendant was 16, and in that case he shot his victim once in the face while attempting to rob her, and in that case, age was held to not to be a mitigating type of factor.

It is submitted to the Court that herewith the Defendant being 19, the evidence was very clear that he planned the robbery, and he deliberated about this, and that he is mature and very sophisticated for his age. [R.T. 19]

The presentence report indicates that he has been using drugs since age 12 or 13, drugs and alcohol, and that he has had a record with the juvenile authorities, and was placed on probation for, I believe it was theft, and had -- was incarcerated in a juvenile home or placement center for awhile.

These are factors that the Court can consider in determining whether the Defendant's age is a mitigating factor, and it is the State's position that in this case the Defendant's age is not a mitigating factor.

Defense counsel will also argue that incapacity is present in this case.

The most recent case on this matter, State v. Jordan, which was only handed down two weeks ago, stated that the fact that the Defendant was to some degree intoxicated, is not by itself a mitigating circumstance. Whether the Defendant's intoxication is a mitigating circumstance depends upon the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the upholding of law was significantly impaired.

We have testimony from the trial that the Defendant's capacity was not significantly impaired

Kimberly Holmes testified that he had been drinking but that he was driving and functioning and talking properly and that there was no impairment.

The Defendant, on the other hand, testified that he [R.T. 20] was passed out or asleep and slept through the whole murder.

I would suggest to the Court that the more reliable witness in this case would be Kimberly Holmes.

In conclusion, Your Honor, the State has proven three aggravating circumstances and no mitigating circumstances exist sufficiently substantial to call for leniency, therefore, the death penalty is appropriate and should be imposed.

If the Court feels that it does not wish to determine -- does not wish to impose death, the State would argue and request that the sentences be run consecutively.

There is a great deal of authority in Arizona which allows the Court to run a life sentence from a murder first degree conviction consecutively to other sentences, and I cited those in my brief.

In fact, the Supreme Court just recently decided in State v. Lujan that it would be proper to run a murder, first degree life sentence consecutively to a burglary sentence, and that is under the new code and applies -- strike that.

I don't know whether that's under the new code or not, but that certainly applies, and I also stated in my argument the cases that cite the fact that double

punishment does not apply in felony murder type of cases because they are separate offenses under the felony murder doctrine, and therefore under the rules of criminal procedure, 26-13, they can be made to run consecutively. [R.T. 21]

So it's the State's position that the death penalty should be imposed because the State has proven beyond a reasonable doubt three aggravating factors, and there are no mitigating factors.

And if this Court does not impose the death penalty, the State would request that the sentences be run consecutively.

Thank you.

MR. HAZELTON: Your Honor, I have submitted a memorandum in anticipation of responding to the aggravating circumstances that are proposed by Mr. Hotham. Also a mitigating memorandum and a sentencing memorandum.

If I could speak first to those arguments set forth by Mr. Hotham, I believe I've covered them all in my memorandum, but to amplify them, Your Honor, as to 13-703 at 3, the scene of the crime was on a deserted highway rather than a public place, or at least there was no evidence of other vehicles or people around.

The only possible person who could have been subjected to grave risk of death would, of course, be Kimberly Holmes.

She testified at the preliminary hearing that the gun was never pointed in her direction.

Indeed, Your Honor, she would have had to have been perpendicular to the fire from the position of the defendant and the victim. [R.T. 22]

Although the victim may have been in close proximity to her door, he was apart

from her door. Her door was open at the first shot, according to her testimony.

He then fell against her door, which implies he was a distance away.

The Defendant, according to her testimony, was to the rear of her car, the victim was to the front, so any line of fire would have had to have been perpendicular to her position. She was not in the line of fire.

She then shut, according to her testimony at the trial and at the preliminary hearing, she then shut the car door. The window was rolled up. She could not have been in grave risk of death.

The second circumstance urged by Mr. Hotham is that the pecuniary gain of proceeds from the robbery is sufficient.

Your Honor, this case cited by Mr. Hotham in Gregg v. Georgia first to an

aggravating circumstance which is different from ours, and I think that many of those cases that he cited, the statute is not the same.

Our statute refers to, and I'm quoting, "the Defendant committed the offense as consideration," and I underscore that, "for the receipt or in expectation for the receipt of anything of pecuniary value."

Mr. Hotham focuses on pecuniary value.

I urge the Court to look at the word consideration. [R.T. 23] Its meaning is significant in contract law. It means an inducement to contract.

The statute in the Georgia case refers to the offender committed the offense of murder for himself or another for the purpose of receiving money or anything of monetary value.

Your Honor, that is a different aggravating circumstance than we have. and that may include a felony murder where the profit motive is evidence (sic).

Here it's very obvious that the language must mean a contract with another, agreement with another, either being paid first and then committing the murder for higher (sic), or committing the murder for higher (sic) and then being paid.

Those are the reasons for the phrase that Mr. Hotham discussed extensively in expectation of the receipt.

Your Honor, that circumstance does not apply in this instance. This was not a contract murder.

And finally, Your Honor, the circumstance of F-6 especially, heinous or cruel and depraved, Mr. Hotham argued

that this crime was heinous, cruel or depraved. It may well be, Your Honor. The statute requires that it be especially.

Citing all the cases even that Mr. Hotham referred to, I believe that the import of all of those decisions is that we have to have something apart from the norm.

I refer to State v. Watson where the Defendant shot [R.T. 24] the victim four times in the back. State v. Brookover, he was shot twice in the back. Even stood over him saying, "It'll be okay, don't worry buddy, it'll be okay," shot him again in the back.

The Court said it was cowardly, but not cruel and depraved.

Your Honor, I think we have to have something than the fact of death imposed

by gunshot wounds to the back. It sets the import of all of the decisions as I read them.

In State v. Lujan as well, the victim lay unconscious after having been hit in the head by another person involved in the commission of the burglary. The killing was absolutely unnecessary to cause any plan of theft or burglary, and the Court there said an unnecessary killing is not enough.

I believe he was stabbed in the back at that point.

There is absolutely no evidence that the victim suffered unnecessarily. Any death you can assume is going to involve pain or suffering to some agree.

There was no evidence of the time of death, which shot caused the death.

The fact of gurgling, as testified by Kimberly Holmes, does not mean the

Defendant was alive, or — strike that — the victim was alive at that point.

There was no evidence of a purge of violence, nothing to comport or to comply with the statutory requirement [R.T. 25] that the acts be especially heinous or especially cruel, just two shots to the back causing death in none other than a swift manner is certainly not in compliance with the statute, nor with its intent, nor with the instruction that's been given by the Supreme Court.

There was no atrocity, no evidence of excessive pain, no evidence of torture, Your Honor.

The fact that a robbery occurred only implies that because it's felony murder there was not a premeditation or the mental element involved to elevate it to murder, first degree, on its own.

I believe in that instance, Your Honor, that it's while the death penalty is available for felony murder, where here the murder was obviously necessary in order to accomplish the robbery. It was done so in a manner not apart from the norm of murders without premeditation.

Your Honor, I believe that the death penalty is wholly inappropriate because there are no aggravating circumstances, and I do believe there are mitigating circumstances.

I have cited in my memorandum the defendant's -- as the Court is aware, the Defendant had turned 19 five days before the date of the homicide.

There are cases in which younger men have been, younger individuals have been sentenced to death. I leave that [R.T. 26] to the Court's discretion in

determining whether this mitigating circumstance does exist.

He was just 19. We try people in Arizona as an adult when they're 18, that's the age of majority. In the overall scheme of things, the age of 19 is young comparatively, and I urge the Court to consider that his age be a mitigating circumstance.

Additionally, Your Honor, there was evidence that the Defendant consumed up to ten beers prior to the commission of the offense, plus quaalude prior to the commission of the offense.

His blood alcohol would have been obviously well over .10, the point of intoxication regared (sic) for driving under the influence, together with the sedative effect of quaalude could not have done anything to enhance his

capacity to appreciate the wrongfulness of his behavior, but had to have reduced his capacity.

And finally, Your Honor, I urge the Court to find those two mitigating circumstances.

Finally, Your Honor, I have submitted a memorandum. I have cited the cases which have heretofore interpreted the statute on double statute, which is was under the old code. A.R.S. 13-1641, and all of those decisions, Your Honor, refer to a circumstance or a commission of a crime where more than one act supported the felony and the murder. [R.T. 27]

Of each of those cases, even the case -- misplaced my notes.

I cited all of the cases. Even the case, I believe it is State v. Clayton, where the court upheld the imposition of

the consecutive sentence for armed robbery, a felony murder.

There the Court held, and I believe it was Justice Lockwood who specifically held that there was -- there were separate acts supporting the robbery, which was a robbery of the manager of the Indian Drive-in here in Phoenix, and then the actual killing of a bystander in the process of escape, and I just point that out to the Court, because in each of these decisions, a common thread, a common finding in each one of them is that there was a separate act.

Obviously in the cases where the Court has upheld consecutive sentences or indeed some of these decisions concerning the fact of conviction alone, because under the old statute, 1641, the Court could not convict a person for acts, for one act and two crimes.

So the question there was simply could he be convicted of two offenses.

Now we know under 116 that he may be convicted of two offenses, but you cannot be sentenced consecutively. So there are slightly different issues being addressed in those cases, but nevertheless, the common thread there was that there be separate acts which supported the convictions for the [R.T. 28] underlying felony and separate act supporting the commission of a homicide, even though it was in -- it was in the same overall time frame, there was separate acts involved.

Here, Your Honor, and I can't stress this enough, that the robbery statute requires for us to overcome a person's resistance in order to take the property from his person or immediate presence, and the jury found that the Defendant

used the force, a deadly force to overcome George Koslosky's resistance to force the surrender of the property, and therefore, it was one act that accomplished the force for the robbery and the homicide. One act, Your Honor.

Therefore, under 13-116, the new code, that one act would limit the Court's jurisdiction in imposing consecutive sentences; therefore, Your Honor, I urge the Court, first of all, to find that no aggravating circumstances exist, as they clearly do not, that there are two mitigating circumstances, and that the only appropriate sentence, therefore, would be life imprisonment.

Also, Your Honor, because of the nature, the felony murder, the reduced mental state of the Defendant is obvious, this Court should run the two sentences

concurrently, the homicide sentence and the armed robbery.

MR. HOTHAM: Just briefly, Your Honor.

As far as the mitigating factor, incapacity, which Mr. Hazelton mentioned, the only evidence that any drugs were [R.T. 29] taken was the testimony of the Defendant, and that's the same person who testified that he slept through the whole thing, so I don't believe that that is credible evidence that can be used to support Mr. Hazelton's position that he had an impaired capacity.

Mr. Hazelton also cited to the Court as far as the factor of cruel and heinous several cases, but I believe that all of those cases which he cited can be distinguished on their facts as to why those were not cruel and heinous, and this one, and the others like it are -- he cited Brookover.

In that case, there were only two shots in very close proximity, and it was during a drug ripoff type of situation, which certainly would be a factor that the Court would take into consideration.

He also cited State versus Watson, where the defendant was shot, but the facts of that case were that the shooting was done during a shoot-out, in other words, one defendant was shooting at the victim, and the victim was firing back at the one defendant, and a second victim came up and shot at the victim.

So that can be distinguished simply because that was sort of a gun fight at O.K. Corral situation, that anything goes, and that would not be an abnormal type of situation.

He also cited Lujan and Ceja, and Lujan simply was referring to a one stab wound

in the abdomen, and the State [R.T. 30] would concur that one stab wound in the abdomen is not cruel or heinous.

What we have here are four separate shots, two of which ended up in the Defendant's back, and one of which occurred after, quite sometime after, I believe the testimony was maybe five minutes after, and the Defendant had dragged the body out into the desert and had put it behind some bushes to hide the body so that it would either lie there and bleed to death or rot before anyone would ever find it.

I believe that these factors show both cruelty, the pain and suffering of the victim and heinousness for the evilness and the depravity in the Defendant's mind.

Thank you.

THE COURT: You're welcome.

See counsel in chambers.

(Court adjourned) [R.T. 31]

[Certificate omitted in printing.]

[R.T. 32]

Special Verdict at Initial Sentencing
July 7, 1980

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff,	)	
vs.	)	NO. CR-109802
DENNIS W. RUMSEY, Defendant,	)	SPECIAL VERDICT

As to aggravating circumstances, the Court finds the following:

1. The defendant has not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant has not been previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense, the defendant did not create a grave risk of death to another person in addition to the victim of the offense.

The Court does find that the defendant did create a risk of death to another person, other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

4. The defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

In this regard, the Court does not agree with the State's interpretation of A.R.S. 13-703(F)(5) and State v. Madsen filed

March 26, 1980. The Court believes that when A.R.S. 13-703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc.

6. The facts of the actual shooting incident itself in this case and the facts of the actual shooting incident in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) are very analogous. In Brookover our Supreme Court specifically found the murder was not committed in an "especially heinous, cruel and depraved manner."

This Court therefore finds that the defendant, Dennis W. Rumsey, did not commit the offense in an especially heinous, cruel or depraved manner.

7. The defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution.

There was some evidence of alcohol and/or drug intoxication. There was substantial evidence that such intoxication did not affect defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. The defendant was not under unusual or substantial duress. In fact, there was no evidence of duress at all.

3. The defendant was the individual who actually committed the offense and was not found guilty by reason of being legally

accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The defendant could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or create a grave risk of causing, death to another person.

5. The defendant was barely 19 years of age at the time of the offense. However, the defendant was wise beyond his years as it relates to what occurred in this case. The Court, therefore, does not find age to be a mitigating factor.

The Court, therefore, finds that no aggravating circumstances exist and no mitigating circumstances exist.

DONE IN OPEN COURT this 7 day of July, 1980.

_____

Judge

RUFUS C. COULTER, JR.

Pronouncement of Intitial Sentence
July 7, 1980

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS WAYNE RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Pages 1 through 7

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:

MR. JEFFREY A. HOTHAM
Deputy County Attorney

For the Defendant:

MR. ARTHUR G. HAZELTON
Deputy Public Defender

Phoenix, Arizona
July 7, 1980

(JEROME R. MALECKA was duly sworn to act as Official Court Reporter herein.)

THE COURT: CR-109802, State of Arizona versus Rumsey. This is the time set for sentencing.

Is the State ready?

MR. HOTHAM: Yes, Your Honor.

THE COURT: Is the Defendant ready?

MR. HAZELTON: Yes, Your Honor. Art

Hazelton appearing for and with Mr. Rumsey.

THE COURT: You are Mr. Dennis Wayne Rumsey?

THE DEFENDANT: Yes.

THE COURT: Mr. Rumsey, you have been charged by the State of Arizona with the crimes of Count I, murder, first degree, a class one felony, and Count II, armed robbery, a dangerous felony and class two felony, involving the use or exhibition of a deadly [R.T. 2][1] weapon, and of these charges you have been found guilty by the jury's verdict.

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1. R.T. is the reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

Do you have anything to say or any legal cause to show why judgment and sentence should not now be imposed?

THE DEFENDANT: No.

THE COURT: Counsel.

MR. HAZELTON: Your Honor, there is no legal cause.

On behalf of Mr. Rumsey, I would urge the Court to follow the recommendation I made in the presentence memorandum regarding the first degree murder conviction. I believe that there is no alternative but to impose life imprisonment under the facts of the case.

And also as to the armed robbery, a dangerous conviction, Your Honor, it's my opinion that A.R.S. 13-116 does not allow anything but a concurrent sentence, given the fact that the armed robbery supported the finding of the murder first degree conviction.

Therefore, Your Honor, I urge the Court to impose any sentence appropriate as a concurrent sentence.

THE COURT: There is no legal cause?

MR. HAZELTON: No legal cause.

THE COURT: Mr. Rumsey, are you in any way dissatisfied or unhappy with the sevices or representation that have been provided to you by your attorney?

THE DEFENDANT: No. [R.T. 3]

THE COURT: No legal cause appearing, and by reason of the findings and the verdict of the jury, it is the judgment of this Court that you are guilty of the crimes of Count I, murder first degree, a class one felony, and that you are guilty of the crime of Count II, armed robbery, a class two and dangerous felony involving the use or exhibition of a deadly weapon.

The Court having heretofore filed its special verdict herein, having found no aggravating circumstances and no mitigating circumstances pursuant to statute, it is ordered as punishment for the crime of Count I, murder first degree, a class one felony, that you be committed to the Department of Corrections for the rest of your natural life without the possibility of parole until you have served 25 calendar years.

As punishment for the crime of Count II, armed robbery, a dangerous offense involving the use or exhibition of a deadly weapon, a class two felony, it is ordered that you be committed to the Department of Corrections for the aggravated term of 25 years -- strike that, I'm sorry, I have to back up.

In connection with Count I, it is ordered this sentence shall commence to run as of this date with the Defendant to receive credit for 231 days heretofore incarcerated in connection with this offense.

Now, as punishment for the crime of Count II, armed robbery, a class two and dangerous offense involving the use of a weapon or dangerous instrument, it is ordered that you be committed [R.T. 4] to the Department of Corrections for the aggravated term of 21 years -- this term is to run consecutive to the sentence imposed in Count I.

The Court's reason for imposing consecutive sentences are as follows:

The Defendant is a significant danger to society and should be removed from society for the protection of society for

the maximum time possible. Based on the record before this Court as to Count II, armed robbery, a dangerous offense, this Court finds, pursuant to A.R.S. 13-702(d)(9), the following aggravating circumstances exist which is not outweighed by mitigating circumstances and which justifies a greater sentence than the presumptive sentence:

One, the Defendant planned this robbery which resulted in the needless death of an individual who befriended the Defendant and girlfriend (sic) in order to obtain what the Defendant knew was only a few hundred dollars to possibly obtain the victim's car, although the Court is satisfied the primary motive was to receive something in the approximate sum of a few hundred dollars.

As I state, based on the record before this Court, the court finds that those -- that that aggravating circumstance does exist which is not outweighed by mitigating circumstances and which justifies a greater sentence than the presumptive sentence.

This judgment shall be the authority for the Director [R.T. 5] of the Department of Corrections to incarcerate you for the period of time provided for by law and the authority of the sheriff to transport you to the Department of Corrections.

Mr. Rumsey, I wish to advise you of your rights to appeal. You have the right to appeal this judgment and sentence just imposed. This appeal must be filed in writing within 20 days from

this date with the Clerk of the Court. If you fail to do so, you will lose your right to appeal.

Do you understand that?

THE DEFENDANT: Uh-huh, yes.

THE COURT: You have the right to be represented by an attorney in connection with that appeal, and if you cannot afford one, one will be appointed for you by the Court at no expense to you. You also have the right to a complete transcript of the entire proceedings and again, if you cannot afford such a transcript, same will be supplied to you by the Court at no expense to you.

Do you understand your rights to appeal?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights to appeal?

THE DEFENDANT: No.

THE COURT: My Bailiff will supply you with a copy of your rights to appeal. I want you to sign it, leave the copy with her -- excuse me, leave the original with her and keep the copy for yourself.
[R.T. 6]

It is ordered remanding the Defendant to the custody of the Sheriff.

Thank you, Counsel.

(Whereupon, the matter was concluded.)

* * * *

[Certificate omitted in printing.]
[R.T. 7]

Initial Judgment and Sentence
July 7, 1980

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

15-E	July 7, 1980	RUFUS C. COULTER, JR.
DIV	DATE	JUDGE OR COMMISSIONER

State of Arizona

vs.

DENNIS WAYNE RUMSEY

County Attorney
By: Jeff Hotham
Adult Probation
Office
Maricopa County
Sheriff's Office

Arthur Hazelton (PD)
Defense Counsel
Clerk of Court, Cr. Judgments
Arizona Department of Corrections

SENTENCE--STATE PRISON--PRESUMPTIVE TERM (COUNT ONE)
(No Prior Conviction Alleged)
AGGRAVATED TERM (COUNT TWO)

The State is represented by the above-named deputy; defendant is present with above-named counsel. Court Reporter: JERRY MALECKA

The defendant is advised of the charge, the determination of guilt and is given an oportunity to speak.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the defendant is guilty of the crime of Count I, Murder, 1st degree, Class 1 felony, and Count II, Armed Robbery, a dangerous and Class 2 felony, involving use or exhibition of a deadly weapon

a nondangerous/dangerous and nonrepetitive class

felony committed on: October 10, 1979

in violation of A.R.S. 13-1105, 1101, 604, 703, 1901, 1902, 1904, 601, 701, 702, 801.

No prior felony conviction was alleged.

Upon consideration of all the facts, law, and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and

that a sentence of incarceration with the Arizona Department of Corrections is appropriate. The Court further finds that there are no aggravating or mitigating circumstances sufficiently substantial to call for a greater or lesser term than the presumptive term.

As punishment for this crime,

AS TO COUNT ONE:

ORDERED that the Defendant be committed to the Arizona Department of Corrections for the rest of his natural life, not to be released until twenty-five calendar years have passed. The sentence will date from July 7, 1980. Defendant is entitled to 231 days of credit as against the sentence for all presentence incarceration served.

AS TO COUNT TWO:

The Court further finds that there are aggravating circumstances sufficiently substantial to call for a term of

incarceration of more than the presumptive term as set by statute. These aggravating circumstances are as stated by the Court on the record.

ORDERED that the Defendant be committed to the Arizona Department of Corrections for a period of twenty-one years, which is the aggravated term. The sentence will run consecutively to the term imposed in Count One.

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

FILED: Special Verdict.

ORDERED exonerating any bond.

ORDERED authorizing the Sheriff to deliver Defendant to the custody of the Arizona Department of Corrections.

ORDERED the clerk shall remit to the Department of Corrections a copy of this order, plus all presentence reports,

probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

FILED: Notice of Rights of Appeal, signed by the Defendant.

RUFUS C. COULTER, JR.

Resentencing Hearing
February 1, 1982

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS W. RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

Reporter's Transcript of Proceedings
Pages 1 through 24

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:

MR. JEFF HOTHAM
Deputy County Attorney

For the Defendant:

MR. ARTHUR G. HAZELTON
Deputy Public Defender

Phoenix, Arizona
February 1, 1982
1:30 o'clock p.m.

(JEROME R. MALECKA was duly sworn to act as Official Court Reporter herein.)

THE COURT: CR-109802, State of Arizona versus Dennis W. Rumsey. This is the time set for pre-sentence hearing as mandated by the Supreme Court -- or by reason of the mandate of the Supreme Court.

Before I proceed further, gentlemen, just to set the tone of the record, I have indicated repeatedly to Counsel that I have a good deal of concern over the provisions of Criminal Rule 26.14, which was not raised or referred to by the Supreme Court in its recent decision.

If you gentlemen are prepared to proceed, you may do so.

MR. HOTHAM: Yes, Your Honor. Does the Court wish to have the State's argument on 26.14 on the record before we [R.T. 2][1] proceed with the aggravation hearing itself?

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1. R.T. is reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

THE COURT: However you gentlemen want to handle it, it's okay with me.

MR. HOTHAM: What I would like to do first then, as I indicated in my -- one of my memorandum, is that the Court has indicated that informally it was concerned that Rule 26.14 of the Arizona Rules of Criminal Procedure would preclude this Court from resentencing the Defendant to death. And the State's position basically is that 26.14, as noted in the comments to that Rule, is a codification of North Carolina v. Pearce, and in North Carolina v. Pearce, dealt with a case in which the Defendant appealed, and the opinion was concerned with the chilling effect that subsequently the imposition of a death penalty after an appeal might have.

And it's the State's position that the North Carolina v. Pearce case and 26.14 does not apply in a case where it is the State appealing, because the State's appealing, whether it's by direct appeal or cross appeal or by way of a special action has no chilling effect upon the Defendant's own desire to file an appeal.

There is another case called United States v. DiFrancisco (sic), which I have cited in my memorandum which is applicable to the case at hand because that is -- it is an appeal by the State in which it was held, and that's a 1980 case, in which it was held that when the government appeals, [R.T. 3] a higher -- heavier sentence may be imposed and that there is no double jeopardy problem.

However, if this Court does feel that 26.14 applies to this pre-sentencing, I

would point out that the last paragraph, the last paragraph of 26.14 states, and I'm paraphrasing, that a more severe sentence can be imposed if the Court concludes on the basis of evidence of the conduct by the Defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate. And solely on that issue, having nothing to do with this aggravation hearing or the aggravating factors stated in 703, the State has appended to its memorandum, two grand jury indictments, one out of Indiana charging the Defendant with capital murder for the murder and rape of a young girl by the name of Karen Troy, and also there is another exhibit which is a current indictment in Arizona charging the Defendant with several counts of attempting -- or conspiracy to

assault and kidnap the Department of Corrections leader and the warden and several other people at the prison.

Also, I believe in the pre-sentence report there is information from the Department of Corrections that the Defendant is indeed not a model prisoner.

Now, all of this information is presented to the Court solely for the issue of 26.14, as I said, and not -- does not go to the aggravating circumstances which the State [R.T. 4] must show. But it's the State's position that if the Court does believe that the 26.14 applies, then you can consider the fact that he's indicted for murder and indicted for conspiracy and assault to kidnap and he's been a bad man in prison, you can consider all those things in determining that your original sentence

of life was inappropriate.

And it's the State's position that that sentence was inappropriate. And Rule 26.14 says that you may consider that solely for that issue.

Now, I would like to address the aggravating factors as provided by 13-703.

In my original sentencing memorandum, the State argued three aggravating circumstances that applied to this particular case. And they were the risk of death to another, the fact that the Defendant's conduct was heinous, cruel or depraved and the fact that the Defendant committed this offense as consideration for the receipt or in the expectation of the receipt of anything of pecuniary value.

I mention that last one first. The opinion of the Supreme Court specifically

states, as we argued to this Court at the original sentencing, that the hope of financial gain in this case was the cause of the murder of George Koslosky and not a result, which is the test that the Supreme Court has adopted for determining whether a robbery or a theft -- a murder committed in the course of a robbery or theft is one of these [R.T. 5] aggravating factors.

The Supreme Court specifically said in its opinion, and I recite page eight and nine of its slip opinion, that the trial court erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain. I think it's clear that the Supreme Court has so ruled and I think it's clear that the Court has an obligation to follow the interpretations

of the Supreme Court as to that particular aggravating factor of 13-703. And also not only that, but its a common sense reading of that factor, the evidence that the Court was presented at the time of the trial showed that the Defendant on at least two or three different occasions prior to the murder told Kimberly Holmes that he was going to rob the victim, George Koslosky, and at the time that he was -- right before he killed the man, he told her that he was going to do it then. And that the murder itself flowed out of the robbery and was a consequence of the robbery and it was a result, the key word is "a result" -- excuse me, a "cause" of the murder and not merely a result, which is what the Supreme Court is talking about.

So I feel that if the Court would refer to my original memorandum that we argued previously, and the Supreme Court decision on this matter, that the Court should realize that it is settled now. There have been three other Supreme [R.T. 6] Court cases that have found this to be an aggravating circumstance.

They cite the Clark case and there is a Tison case and another case more recently. So that earlier there was reason to be unsure of what the Supreme Court says. But at this late date there are at least three Supreme Court cases that says, yes, this is an aggravating circumstance.

So I believe that the Court should accept that and find that as an aggravating circumstance in this case.

I would also like to reargue the two points which I had originally argued which are also applicable. In the Court's special verdict of July, 1981, the Court found as to the aggravating circumstance of the risk of death to another, the Court specifically found that the Defendant did create a risk of death to another person other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

Unfortunately the statute doesn't tell us what a grave risk is and what a non-grave risk is. I would simply point to the other cases, and one of the other cases is State v. Blazak, which I have cited in my memorandum, and that case there were several patrons sitting inside a bar and the defendant came in and shot around wildly. And the death penalty was affirmed in that case.

As for grave risk, I think we have to use a common sense definition, and if the Court will recall from the [R.T. 7] testimony, Kimberly said she was right inside the car door on the passenger side and the door was open and the victim was standing right next to her outside of the car door and the Defendant was standing just a few feet back, and that he fired once up into the air and then aimed and fired at the victim, George Koslosky and hit him twice right as he was standing next to the victim -- or next to Kimberly Holmes. I think that a common sensical definition of grave risk of death includes that when they are just inches apart and there is a man a few feet away firing a weapon which strikes the victim and knocks him to the floor -- to the ground, that indeed is grave risk. And I

think the Court perceived that when you wrote in your special verdict that there was a risk of death to Kimberly Holmes.

And I'm asking at this time that the Court find that there was a grave risk to Kimberly Holmes, and that the Court find that as a second aggravating factor.

There is a third possible aggravating factor that the State argues and that is the Defendant committed the offense is an especially heinous, cruel or depraved manner. Now, I note from this Court's special verdict in July of '80 that the Court cited State v. Brookover and talked about the facts in Brookover, and that the Supreme Court had found that the murder was not especially heinous, cruel or depraved.

Well, since the Brookover decision, there have been four or five different

decisions, and the Supreme Court [R.T. 8] has tilted away from the Brookover decision and has been finding routinely cruel and heinous activity in situations such as this. And I've cited most of those cases in my memorandum, Ceja, Steelman, Mata and there are two or three others that have occurred since that time. And it appears that the Supreme Court now is talking about conduct being cruel and heinous, even though it can't apply in Brookover, it now seems to be applying in more of a -- in more recent cases, even though the facts are very similar.

So I would request that the Court reconsider its original determination about the cruelness and the heinous and depravity involved in this particular case. Here, the conduct is both heinous

and cruel. It's heinous because of the depravity and evil in the mind of the Defendant which can be seen by the repeat shootings of the victim in the victim's back while the victim lay helplessly on the ground and then dragging the body out into the desert and leaving the body there to die, to bleed to death. In fact, there was some testimony that the Defendant shot the victim one more time, a fourth time in the back and then said, "See you later, dude", or something like that. That goes to mental state, depravity as it is defined in Ceja.

Also, Your Honor, his conduct was cruel because of the mental anguish to the victim as he pondered suffocating in the trunk. The Defendant ordered him to get into the trunk. [R.T. 9] Certainly that would cause mental anguish in his mind

and certainly he felt pain as he was shot two or three times by the Defendant and as he bled to death out in the desert.

For those particular reasons, the State believes that that aggravating circumstance also applies.

The State believes strongly that there are three aggravating circumstances that the Court should apply. There is at least one for sure that the Supreme Court has indicated applies in this particular matter, and I would refer the Court to 13-703(E), Your Honor, the last half of that says that in weighing the circumstances, if the Court finds one or more of the aggravating circumstances enumerated in Subsection (F) of this Section, that's the three I have just been talking about, and that there are no mitigating circumstances sufficiently

substantial to call for leniency, then the Court shall impose a sentence of death.

I believe that it's mandatory upon the Court to do so. And the Court has already specifically found in its special verdict of July, 1980, that there were no mitigating circumstances present.

The Court discussed the ones as required by the statute and found none of them to apply. And there were no other mitigating circumstances present at that time.

Now, Mr. Hazelton has argued that a new mitigating circumstance has arisen since that time and he cites a case [R.T. 10] called Schad, which was a felony murder case. And the court said that yes, -- the Supreme Court said that yes, the fact that it is a felony murder case is one of

the things that can be considered as a mitigating factor. But I would submit to the Court that there is a big difference between a mitigating factor and being substantially sufficient to call for leniency.

You will note that 1304 -- excuse me 703(E) talked in terms of mitigating circumstances sufficiently substantial to call for leniency. And the cases that held that yes, the Court can find so and so or such and such type of conduct to be mitigating but there is a weighing test involved and the final determination is whether that particular item is sufficiently substantial to call for leniency.

It is the State's position and even the decision in Schad that there -- as far as being a mitigating circumstance, that

that does not outweigh the various aggravating circumstance. And so what the State would like and request the Court do at this time is confirm its original special verdict, that there are no sufficiently substantial mitigating circumstances and to find at least one, ideally all three, of the aggravating circumstances that are present in this case and then proceed under 13-703(E) which mandates -- which requires upon the finding of at least one aggravating circumstance that the Court must impose a sentence of death. I believe it's [R.T. 11] appropriate in this case and should be done.

Thank you.

MR. HAZELTON: Art Hazelton appearing with Mr. Rumsey. Your Honor, I have filed with the Court a sentencing

memorandum and provided the Court with a copy of the decision in Bullington v. Missouri, which I rely on in that decision -- in that memorandum, excuse me.

Your Honor, at the outset I'd like to make it clear that I believe that in the prior special verdict found -- this Court found that several -- all of the enumerated aggravating circumstances did not exist. And the Supreme Court has, of course, instructed this Court as to how to determine or interpret A.R.S. 13-703(F)(5) -- excuse me, (F)(4).

Nevertheless, I believe the Court has instructed the Court that that should have been interpreted as an aggravating circumstance.

It's the Defense's position here, Your Honor, and it will be my urging for the Court to resentence the Defendant to life

imprisonment as was ordered in the first sentencing.

Your Honor, I believe that unlike Mr. Hotham, Rule 26.14 does apply despite the silence of the Supreme Court in its decision concerning the issues raised in that rule, and the decision which it's based upon, which is North [R.T. 12] Carolina v. Pearce. And I have briefed that case. I know that the Court is familiar with it.

I believe that this Court pursuant to that rule and the constitutional issues discussed in the Pearce case which really center around due process, reguire that the Court give no greater sentence to the Defendant than was imposed in the first sentencing.

I believe that Mr. Hotham has really conceded that there are no -- there is no

conduct which has occurred after the sentence was -- that was imposed in June or July of 1980 that amounts to conduct which should increase the sentence from life imprisonment to death.

I believe that in reading the Rule 26.14 that the Court must also read into that the sentencing requirement of 13-703. I believe that the conduct must amount to an aggravating circumstance in order to increase the punishment. I don't believe simply behavioral problems in the prison can suffice for this Court to reconsider its prior determination of life imprisonment, all other factors being equal and impose a greater sentence, which the only other choice is death. I believe that you have to find an aggravating circumstance and the State has failed to present any evidence of an

additional aggravating circumstance occurring after the first sentence was imposed.

I will just point out that the indictments that [R.T. 13] Mr. Hotham refers to, the one which is an indictment out of Indiana was brought down in August of 1981, alleging the homicide of a girl named Karen Troy, I believe, which occurred prior to the sentencing of the Defendant in this matter. And I also understand that the indictment out of Pinal County, I believe, has been dismissed and I think has been refiled, possibly reducing the charges in some way. But nevertheless, they are only indictments and they don't amount to convictions under the aggravating sections of 13-703. And there is no other conduct that's been alluded to even

in the pre-sentence report that amounts to an aggravating circumstance.

So if the Court takes the Defendant's position that the Rule 26.14 must apply, not only because it's a rule as the Supreme Court has promulgated, but also because it stands for the constitutional interpretation by the Supreme Court of the United States in North Carolina v. Pearce, then this Court is without power to impose the death penalty in this case, despite the provisions that were cited by Mr. Hotham in 13-703 when an aggravating circumstance is found.

Your Honor, I also believe the decision of Bullington v. Missouri, and I believe there an issue which is discussed in Pearce is extended, and that is the principle of double jeopardy. In the Bullington case the Supreme Court of the

United States found that the bifurcated sentencing provisions of Missouri's death penalty statute really amounted [R.T.. 14] to a separate trial. The only difference, and I've read the statute that the Court was referring to. It's in the footnotes in the Bullington decision, which the Court has here. The only difference in that case is simply that the jury was the fact finder and the jury was the one that imposed the sentence. I see no difference at all in our statute but for that one difference and I believe that it shouldn't destroy the use that the Supreme Court meant it to be in the Bullington decision.

I believe that double jeopardy does attach and I think that the death penalty and punishment concerning homicide in the first degree is different than sentencing

other crimes such as property crimes, assault, whatever. I believe it's different because in that hearing, the one that we had here just in 1980, it was a hearing where the State was required to bear the burden of proof in proving aggravating circumstances, and the Defendant was required to put on proof of mitigating circumstances. And the Court was required to find a special verdict. Therefore, it is a second trial, although it may lack some of the same kinds of structure that is in the jury trial that preceded it, nevertheless it's a hearing and that's exactly what the decision in Bullington found, that it was a separate trial, that double jeopardy attaches. And if you get life in prison, once it's brought back, regardless of the method of which it's brought back to [R.T. 15] the

Court, the Court can't impose the death penalty, double jeopardy attaches.

He was found not guilty of the death penalty in the special hearing by special verdict and double jeopardy attaches from then on.

Your Honor, all of this can be alleviated in my opinion and I believe the circumstances calls for this entire issue here concerning what the Court is to do upon resentencing when the Supreme Court has said that you mistakenly interpreted the statute and you should have found an aggravating circumstance and I discuss that in my memorandum. And Mr. Hotham has referred to it in State v. Schad. The Court did find and this was a decision that came out in 1981 and it was a decision that came out obviously after this Court issued its special verdict and

was -- it was not something that I believe is a mitigating circumstance as such at the time. But nevertheless the Court in Schad and it's mentioned in my citations in my memorandum that the giving of a felony murder instruction is a mitigating circumstance and it was properly construed by the Court.

Not only here do we have a circumstance where that instruction was given, but I think the Court can consider the testimony of the juror-foreman who came in at the last sentencing hearing. His testimony was that the jury rejected premeditated murder, which was the other instruction and found the Defendant guilty of murder in the first degree on the felony [R.T. 16] murder instruction.

Now, so beyond just the fact that the instruction was given along with another

instruction, you have here that the jury followed that instruction in giving its -- rendering its verdict.

Your Honor, I believe that therefore, this mitigating circumstance which I don't believe was discussed by the Court in the first special verdict, should be weighted and considered by the Court to counter-balance the required aggravating circumstance that the Supreme Court of Arizona has ordered the Court to find. And I say that for several reasons.

Nowhere in A.R.S. 13-703 does it say that the aggravating circumstances that are to be considered by the Court are of equal weight, one to another, or against any of the mitigating circumstances in 13-703(G), which the Court must consider and that others can consider.

Your Honor, in this particular

aggravating circumstance that you must find, apparently I believe that it was of a value or of weight much less than the other aggravating circumstances which the Court has found do not exist and I believe properly has found such.

Your Honor, we have here a case where had the felony murder instruction not been given, the jury, I believe, would have been required to find murder second. I believe [R.T. 17] there was no premeditation. The jury rejected that instruction and found on felony murder. So what you have, the felony murder statute elevates an offense from murder first -- from murder second degree really to murder first degree, and that being true, the Defendant really gets punished twice for the same conduct, that is he gets punished for having committed a

murder during the perpetration of an armed robbery and then because it was armed robbery that he was committing the murder for, he gets sentenced to death. So you have compounding the same acts, the same acts and the same circumstance twice. Therefore, my argument is that that aggravating circumstance should not be weighted as heavily as, say a circumstance that does not exist here. But under 703(F)(1), where the Defendant has been convicted of other crimes involving life imprisonment or serious physical injury or violence or threats of violence under (2), I believe that those are probably more serious aggravating circumstances and we don't have those here.

But I believe under the facts of this case that this Court should not weight

the aggravating circumstance under 4 -- (F)(4) as heavily as Mr. Hotham would ask the Court to do. But I think that the Court should consider the mitigating circumstance that the Supreme Court has said is a mitigating circumstance and find that the aggravating circumstances do -- that one aggravating circumstance does not require the imposition of the death penalty because of the sufficiency of [R.T. 18] the mitigating circumstance which I believe does exist. And I -- the Supreme Court of Arizona says it is a mitigating circumstance so you have to consider it. But in that weighting process, the balancing I believe these factors are very important for the Court's consideration and I do think you have a compounding of one act to elevate this offense from murder second all the

way to murder first degree and then the death penalty, if Mr. Hotham's argument is persuasive to the Court, and I believe that should not be.

Your Honor, I have no other evidence to present. I have presented none in this hearing at all. I know that the Court is concerned about the interpretation of the Supreme Court's mandate here for resentencing.

Your Honor, the Supreme Court cannot mandate that this Court impose the death penalty and I therefore don't believe that it should be read into the decision that it's mandatory that you impose the death penalty. I believe that I cited the legal authority which would require you to impose the same sentence. I believe that it would be unlawful, despite the wording of A.R.S. 13-703, it

would be unlawful -- it's on higher authority, I believe, the Constitution of the United States, to impose a more strict or harsh sentence upon Mr. Rumsey.

Therefore, I urge the Court to reimpose the same sentence of life imprisonment. [R.T. 19]

MR. HOTHAM: Just briefly, Your Honor, the State is asking that the Court find aggravating factor (F)(5). Mr. Hazelton was referring to (F)(4).

Also, the indictments on this defendant are subsequent to the date of the sentencing and that is all that is required by 26.14 as to whether the conduct was inappropriate -- or the sentencing was inappropriate.

I think a distinction had to be made and I think Mr. Hazelton was trying to blur that distinction. The Court can

consider the subsequent conduct of the defendant. The indictment for murder in Indiana and the indictments for conspiracy in Florence, the Court can consider those matters for determining whether the original life sentence was inappropriate. But it cannot consider those matters for this sentencing as far as an aggravating factor.

Now, Mr. Hazelton also argued and cites to the Court the case out of Missouri, Bullington, and says it is essentially the same as it is in Arizona and therefore Bullington should apply. That's not true. And he alluded to the main difference, the main difference in Missouri is the jury first has one trial to determine the man's guilt and then a whole new and seperate trial to determine the sentence. So the double jeopardy

situation can be clearly seen because he has two trials and the jury acquits him, they either find him guilty of capital murder or not guilty. And so they [R.T. 20] actually go ahead and acquit the man, there is a jury decision of acquittal in that second stage.

Arizona is completely different. The jury decides the guilt, and then the Court reviews the aggravating factors and makes a determination after a hearing. So Bullington does not apply to what we are talking about.

And besides that, Pearce and Bullington and DiFrancisco (sic) and all of these other matters were argued in front of the Supreme Court on this very motion and the Supreme Court was cognizant of all those problems and all the arguments and the merits to each one of those arguments,

still sent it back to this Court, telling you that there is an aggravating circumstance that you can consider and you should consider.

Now, common sense tells you that if they didn't think you had the power to resentence him to death, they would not have wasted all our time by sending this back down to you. Common sense tells you they thought about the matter, they decided, even though it's not in the opinion, but they decided you do have the power, and they were remanding it back to you to make the decision with the instructions that they think, at least -- at least one aggravating circumstance applies.

Now, Mr. Hazelton talks about a new mitigating circumstance that you can and should consider, that being a felony

murder case. Mr. Hazelton argued that previously at the past aggravating and mitigation hearing. That was the [R.T. 21] sole reason why he brought the foreman on to testify, was to tell you that, yes, they deliberated and they came back on the felony murder instruction. He was in a sense arguing to you that that was mitigating and that you shouldn't have considered -- that you should consider that as a mitigating factor. That essentially is what he is doing now. And you knew and were cognizant of the fact that it was a felony murder and yet in your special verdict you found that there were no mitigating factors. And certainly if you want to reconsider that at this late date, using the authority of Arizona v. Schad, you may consider that as a

mitigating factor if you desire. But certainly, in weighing all of the aggravating circumstances against this potentially mitigating circumstance, the mitigating circumstance is not substantially sufficient to call for leniency, considering all the heinous conduct and all the ugly facts of this murder.

And Mr. Hazelton seems to argue that the factors in 703 cannot be used because they are elevating murder first degree from whatever to a death penalty situation. But in all cases of any aggravating factors, it's the same act or similar act being used and the constitutionality of 703 and all of these aggravating factors has been approved. These, specifically the statute, has been found constitutional by the Supreme Court

at least eight or nine different times on each one of these various aggravating factors. And simply what they are doing is [R.T. 22] they are separating out the common run of the mill murder, I suppose, from these particular murderers that deserve the death penalty. And the Legislature has determined in its wisdom that armed robbery murderers are murderers that we want to give the death penalty to, or at least the discretion. It's one of the factors that has to be weighed.

The Legislature has so spoken. The Supreme Court has affirmed. And it is up to you to weigh all of these factors, and I think that the Court should find that the death penalty is appropriate and should indeed sentence the Defendant to death.

MR. HAZELTON: Just briefly, Your Honor, Mr. Hotham referred to my arguing the felony murder as a mitigating circumstance in the prior pre-sentence hearing. I don't believe I did and my memorandum entitled "Mitigation Memorandum", does not discuss that.

The only reason I brought the jury foreman in at that hearing, Your Honor, was to argue, and I have to admit now I argued unsuccessfully that any sentence for the armed robbery must run concurrently with the sentence for the murder. And that's why I brought that in and I had a separate memorandum that I had written on that issue. I don't believe I did argue it to the Court.

THE COURT: Anything further, Counsel?

MR. HOTHAM: No, Your Honor. [R.T. 23]

MR. HAZELTON: No, Your Honor.

THE COURT: Okay. I would like to see Counsel in Chambers for a few moments.

And deputies, if you would keep Mr. Rumsey here until we are finished in Chambers, I would appreciate it. Thank you.

(Whereupon, a recess ensued.)

* * * * * *

[Certificate omitted in printing.]

[R.T. 24]

Special Verdict at Resentencing
February 4, 1982

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	NO. CR-109802
	)	
DENNIS W. RUMSEY,	)	SPECIAL VERDICT
	)	
DEFENDANT.	)	
	)	

As to aggravating circumstances, the Court finds the following:

1. The defendant has not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant has not been previously convicted of a felony in the

United States involving the use or threat of violence on another person.

3. In the commission of the offense, the defendant did not create a grave risk of death to another person in addition to the victim of the offense.

The Court does find that the defendant did create a risk of death to another person, other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

4. The defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The defendant did commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value in that "the hope of financial gain was a cause of the

murder" State v. Rumsey, filed November 4, 1981, No. 5042.

6. The State has urged the Court to find that the offense was committed in an especially heinous, cruel and depraved manner. The Court has reviewed all of the cases cited by the State. The Court again finds that the facts of the actual shooting incident itself in this case and the facts of the actual shooting incident in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) are very analogous. In Brookover, our Supreme Court specifically found the murder was not committed in an "especially heinous, cruel and depraved manner."

This Court therefore finds that the defendant, Dennis W. Rumsey, did not commit the offense in an especially heinous, cruel or depraved manner.

7. The defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution.

There was some evidence of alcohol and/or drug intoxication. There was substantial evidence that such intoxication did not affect defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. The defendant was not under unusual or substantial duress. In fact, there was no evidence of duress at all.

3. The defendant was the individual who actually committed the offense and was not found guilty by reason of being legally accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The defendant could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or create grave risk of causing, death to another person.

5. The defendant was barely 19 years of age at the time of the offense. However, the defendant was wise beyond his years as it relates to what occurred

in this case. The Court, therefore, does not find age to be a mitigating factor.

6. The defense has urged a felony murder rule conviction as a mitigating circumstance.

Assuming the jury returned a verdict of first degree murder pursuant to the felony murder rule only and that such constitutes a mitigating circumstance, this Court under all the circumstances of the case, specifically including, but not limited to the fact that defendant rather than a companion committed the homicide, cannot find that to be a mitigating circumstance sufficiently substantial to call for leniency.

The Court having taken into account the aggravating and mitigating circumstances, the Court finds that one aggravating circumstance exists, to-wit: the offense

was committed in expectation of the receipt of something of pecuniary value; namely, money; and the Court further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

DONE IN OPEN COURT this 4 day of Feb., 1982.

_____

Judge
RUFUS C. COULTER, JR.

Pronouncement of Resentence
February 4, 1982

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS W. RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

Reporter's Transcript of Proceedings
Pages 1 through 8

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:

MR. JEFF HOTHAM
Deputy County Attorney

For the Defendant:

MR. ARTHUR G. HAZELTON
Deputy Public Defender

Phoenix, Arizona
February 4, 1982
9:30 o'clock a.m.

(JEROME R. MALECKA was duly sworn to act as Official Court Reporter herein.)

THE COURT: CR-109802, State of Arizona versus Dennis W. Rumsey. This is the time set for resentencing.

Is the State ready?

MR. HOTHAM: The State is ready, Your Honor. Jeff Hotham appearing.

THE COURT: Is the Defendant ready?

MR. HAZELTON: Yes, Your Honor. Art Hazelton appearing with Mr. Rumsey.

THE COURT: Would you approach the Bench, please.

You are Mr. Dennis W. Rumsey?

THE DEFENDANT: Yes.

THE COURT: Mr. Rumsey, you have been charged by the State of Arizona with the crime of murder, first degree, of [R.T. 2][1] which charge you have been found guilty by a jury's verdict, which verdict has been affirmed on appeal. However,

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1. R.T. is the reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

this matter has -- however, the sentence heretofore imposed has been vacated by the Supreme Court of this State and the matter has been remanded for resentencing. Do you have anything to say or any legal cause to show why resentencing should not now be imposed?

THE DEFENDANT: No.

THE COURT: Counsel.

MR. HAZELTON: Your Honor, I already argued to the Court at the sentencing hearing. And I would urge the Court to resentence the Defendant as I argued thereto, life imprisonment. I believe that is the only lawful sentence the Court can impose.

THE COURT: Mr. Rumsey, are you in any way unhappy or dissatisfied with the services or representation that's been provided to you by your attorney?

THE DEFENDANT: No.

THE COURT: There is no legal cause?

MR. HAZELTON: No, Your Honor.

THE COURT: The Court's special verdict reads as follows:

"As to aggravating circumstances, the Court finds the following:

1. The Defendant has not been convicted of another offense in the United States for which under Arizona [R.T. 3] law a sentence of life imprisonment or death was imposable.

2. The Defendant has not been previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense, the Defendant did not create a grave risk of death to another person in addition to the victim of the offense. The Court does find that the Defendant did create a

risk of death to another person, other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

4. The Defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The Defendant did commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value in that the hope of financial gain was a cause of the murder."

And in support of that, I cite State v. Rumsey filed November 4, 1981, No. 5042.

"6. the State has urged the Court to find that the offense was committed in an especially heinous, cruel and depraved manner. The Court has reviewed all of

the cases cited by the State. The Court again finds that the facts of the actual shooting incident itself in this case and the facts of the actual shooting incident in State v. Brookover, 124 Ariz. [R.T. 4] 38, 601 P.2d 1322, are very analogous. In Brookover, our Supreme Court specifically found the murder was not committed in an especially heinous, cruel and depraved manner. This Court therefore finds that the Defendant, Dennis W. Rumsey, did not commit the offense in an especially heinous, cruel or depraved manner.

7. The Defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution. There was some evidence of alcohol and/or drug intoxication. There was substantial evidence that such intoxication did not affect the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. The Defendant was not under unusual or substantial duress. In fact, there was no evidence of duress at all.

3. The Defendant was the individual who actually committed the offense and was not found guilty by reason of

[R.T. 5] being legally accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The Defendant could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause or create a grave risk of causing death to another person.

5. The Defendant was barely 19 years of age at the time of the offense. However, Defendant was wise beyond his years as it relates to what occurred in this case. The Court, therefore, does not find age to be a mitigating factor.

6. The Defense has urged a felony murder rule conviction as a mitigating circumstance.

Assuming the jury returned a vedict of first degree murder pursuant to the felony rule only and that such constitutes a mitigating circumstance, this Court under all the circumstances of this case, specifically, including, but not limited to the fact tht the Defendant rather than a companion committed the homicide, cannot find that to be a mitigating circumstance sufficiently substantial to call for leniency.

The Court having taken into account the aggravating and mitigating circumstances, the Court finds that one aggravating circumstance exists, to wit: this offense was committed in expectation of the receipt of something of pecuniary [R.T. 6] value; namely, money; and the Court further finds that there are no mitigating circumstances sufficiently substantial to call for leniency."

No legal cause appearing, as punishment for the crime of first degree murder, it is ordered that you suffer the penalty of death to be inflicted by lethal gas under the supervision of the Department of Corrections.

Sir, you have the right to appeal and in fact by law it is mandatory and the Clerk is hereby directed pursuant to Rule 1626.15 (sic) to file a notice of appeal to the Supreme Court of this State.

You have the right to be represented by an attorney in connection with that appeal, and if you cannot afford one, one will be appointed for you by the Court at no expense. You have the right to a complete transcript of the entire proceedings, and again, if you cannot afford such a transcript, same will be supplied to you by the Court at no expense to you.

Do you understand your rights to appeal?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights to appeal?

THE DEFENDANT: No.

THE COURT: My bailiff will supply you with a copy of your rights to appeal. I want you to sign it, leave the [R.T. 7] original with her and keep a copy for yourself before you leave here this morning.

I have copies of the verdict for Counsel if you want them in Chambers.

The Court will stand at recess.

(Whereupon, a recess ensued.)

* * * *

[Certificate omitted in printing.]

[R.T. 8.]

Judgment and Sentence upon Resentencing

February 4, 1982

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

A-C Feb. 4, 1982 RUFUS C. COULTER, JR.
DIV DATE JUDGE OR COMMISSIONER

State of Arizona — County Attorney By: Jeff

Hotham
vs.
A.P.O.

DENNIS WAYNE RUMSEY — Arthur Hazelton

(P.D.)

Sheriff's Office

D.O.C.

Clerk of Court, Cr. Judgments

This is the time set for resentencing. State is represented by Jeff Hotham; Defendant Dennis W. Rumsey is present with counsel Arthur Hazelton.

Court Reporter: JERRY MALECKA.

The defendant is advised of the charges, the determinations of guilt and is given an oportunity to speak.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the crime of Count I, Murder, First Degree, Class 1 felony, committed on October 10, 1979 in violation of A.R.S. 13-1107, 1101, 604, 703, 1901, 1902, 1904.

As to Count I, the Special Verdict is read by the Court and is filed.

There being no legal cause to delay.

ORDERED as to Count I that the Defendant be punished for Count I by death by the administration of lethal gas under the supervision of the Department of Corrections.

ORDERED directing the Clerk of the Court to send to the Department of Corrections along with the sentencing order, copies of all presentence reports, probation violation reports, medical and mental health reports prepared as to or relating to this Defendant.

ORDERED that the Defendant is remanded to the custody of the Sheriff of Maricopa County and that the Sheriff is ordered to deliver the Defendant to the Department of corrections (sic) together with a signed, certified copy of this judgment and sentence so that the Department of Corrections may carry out the sentences just imposed.

ORDERED directing the Clerk of the Superior Court of Maricopa County to file a Notice of Appeal from this judgment and sentence.

ORDERED appointing Mr. Arthur Hazelton to represent the Defendant on his appeal.

ORDERED directing the Sheriff of Maricopa County to return the Defendant, Dennis W. Rumsey, to the Department of Corrections, the resentencing procedure for which the Defendant was returned to this Division having been concluded.

RUFUS C. COULTER, JR.

(3583D, 3592D)

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